International Philanthropy: Non-tax issues that every EO lawyer needs to know

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Agenda

• Challenges in Cross-border Giving
• US Sanctions
• FARA
Challenges in Cross-border Giving

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78 Countries: 250 Initiatives

- Western Hemisphere: 10 Countries
- Sub-Saharan Africa: 17 Countries
- MENA: 10 Countries
- South Asia: 7 Countries
- Europe: 13 Countries
- Eurasia: 12 Countries
- East Asia & Pacific: 9 Countries
Trajectory

- Enabling: 62%
- Restrictive: 38%
Wave 1: Registration Restrictions

- Turkmenistan: 400 founders
- Eritrea: $1 million capitalization
- Egypt: prohibition on “work of a political nature”
- China: complex approval processes
- Bahrain: no need for association’s activities or another organization in the same field
Wave 2: Resource Restrictions

Constraints on cross-border philanthropy

- Outflow restrictions
- Inflow restrictions
- Stigmatization
Constraints on the Outflow of Philanthropy

- Sanctions
- Export Controls
- Counter-terrorism/Anti-Money Laundering
- Bank De-risking
Bank De-risking

- 8,665 U.S. NPOs operating abroad
- 2/3 experience banking problems
- Common problems include:
  - Delays of wire transfers (37%)
  - Unusual documentation requests (26%)
  - Increased fees (33%)

Inflow of Philanthropy: Government Approval

- China
- India
- Egypt
- Bangladesh
- Pakistan
Caps on Cross-Border Funding

• Ethiopia Charities and Societies Proclamation No. 621/2009 (Repealed 2019): No nonprofit receiving more than 10 percent of its funds from an international source “may engage in activities that advance human and democratic rights; promote the equality of nations and nationalities and peoples and that of gender and religion; promote the rights of disabled and children’s rights; promote conflict resolution or reconciliation, and promote the efficiency of the justice and law enforcement services.”
• Kenya Bill 2013: 15% cap on international funding
Foreign Agent Laws
Wave 3 - Innovations

- **Tanzania**: recent amendments to the Statistics Act make it illegal to discredit or challenge any official government statistic.

- **Uganda**: after songs critical of the government gained popularity, the government proposed regulations that require artists to have their lyrics and scripts vetted by the authorities.

- **Hungary**: the Orbán government imposed a 25% tax and other restrictions on civil society organizations assisting migrants.
Trendspotting

• Crypto-philanthropy
• Artificial Intelligence
• Natural Resources
• Rise of China
• “Globalization of Isolationism”
US Sanctions – Meet the Agencies

• Treasury Department’s Office of Foreign Assets Control ("OFAC")
  • Administers and enforces comprehensive and list-based economic sanctions programs against specific countries, territories, governments, entities, and individuals
  • Separate sets of regulations for each sanctions program, and rules vary widely across different programs
  • Aggressively enforced – potentially substantial fines and other consequences for non-compliance

• Commerce Department’s Bureau of Industry and Security ("BIS")
  • Regulates exports, reexports and transfers of US-regulated items and technologies
  • Administers and enforces the Export Administration Regulations (EAR)
Scope of OFAC Jurisdiction: US Persons

• OFAC regulations apply to “US persons”
  • US citizens and permanent residents, wherever located
  • Entities legally organized under US law (including not-for-profit entities) and their employees, wherever located
  • Anyone physically present in the United States, regardless of nationality
  • Foreign branches of US companies (i.e., entities abroad that are not separately incorporated)
  • Cuba and Iran: Foreign entities that are “owned or controlled” by US persons
OFAC Sanctions Map

Comprehensive Sanctions: Prohibition against most dealings
List-Based Sanctions: Specially Designated Nationals Risk (based on programs identified on OFAC website)
OFAC Lists – Specially Designated Nationals

OFAC maintains lists of sanctioned persons, including the Specially Designated Nationals and Blocked Persons (“SDN List”)

• The SDN List has over 7,000 persons – including individuals, companies, banks, hotels, vessels, and others – that are effectively off-limits to US persons
• The SDN List is updated frequently (new names are added and some names are removed)
• The SDN List is available, and searchable, on the OFAC website
• Property and property interest of certain SDNs must be blocked (i.e., frozen)
• OFAC takes the position that any party that is owned 50% or more by one or more SDNs is itself an SDN
Elements of OFAC Sanctions

• Unless OFAC has provided authorization (i.e., a specific or general license) or an OFAC exemption applies:
  
  • US persons cannot provide funds or services (i.e., assistance, training, advocacy, etc.), either directly or indirectly (such as through a grantee), to sanctioned countries, areas, or persons
  
  • Direct or indirect US export/import trade in goods or services with target country, territory, or person is prohibited
    
    • Note in particular onerous US Commerce Department license requirement for tools of trade on temporary travel to Syria
  
  • No investment or financing by US persons in target country or territory
  
  • No dealings by US persons in property of a sanctioned country, territory, or person (e.g., Iranian crude)
  
  • US persons cannot facilitate, approve, support, etc., most activities by third parties that the US person could not undertake directly
Facilitation

• Examples of prohibited facilitation include:

  • A US NGO referring a grant opportunity involving a sanctioned country to a non-US person (either in the same organization or an outside organization) to avoid application of sanctions

  • A US NGO changing its grant approval procedures with respect to a particular grant involving a sanctioned person so the approval could be granted by a non-US person (where previously a US person had to approve)

  • A non-US NGO making a grant payment denominate in US Dollars to a grantee in a sanctioned country

  • A US NGO processing or approving a grant in the United States, or with US system support, that was entered into between a non-US person and a grantee in a sanctioned country
OFAC Exemptions / Authorization

• Transactions by or involving US persons related to a sanctioned country, territory, or person require some form of OFAC authorization:

• **OFAC Exemption**: Certain transactions are carved out of the regulations (e.g., export or import of “informational materials”)

• **“General License”**: an OFAC permission found in the OFAC regulations that can be relied upon by any US person without notifying OFAC, provided the general license’s restrictions are observed

• **“Specific License”**: a permission applied for in writing from OFAC, issued by OFAC, which generally can only be relied upon by the US person that applied for the specific license
General Licenses in OFAC Programs

• Each of the Cuba, Iran, North Korea, Syria, and Crimea sanctions programs contain one or more “general licenses” authorizing certain not-for-profit activities

• Determining whether a general license authorizes a particular activity (or grant payment) is a highly fact-specific and individualized exercise
  
  • Careful review of the scope of the general license and the conditions and limitations it contains
  
  • Detailed knowledge of the proposed activity or grant

• Certain general licenses have reporting requirements and other conditions that must be observed
Considerations for US Grant-making Organizations

• Questions to consider before making a grant to grantee with operations outside the United States:
  • Is the grantee a sanctioned person, or owned or controlled by one or more sanctioned persons?
  • Does the grantee operate in a sanctioned country or area?
  • Would the activities covered by the grant agreement take place, in whole or in part, in a sanctioned country or area, or one that is high-risk from a sanctions perspective?
  • Might the grantee’s activities involve the provision of services or support to, or any transaction, dealing, or activity with or involving, a sanctioned person?

• If the answer to any of these questions is “yes,” consider:
  • US person involvement (grantee, grantor, third parties)
  • OFAC authorization (a general or specific license or exemption)
Compliance Safeguards to Consider

- Due diligence reviews of potential grantees, especially new grantees
- Sanctions screening of grantees and sub-grantees
- Careful consideration of grant proposals to determine if the grantee plans to, or is likely to, engage in activities in a sanctioned country or area or with a sanctioned person
  - Consider the countries or territories where the grantee plans to operate – some have a high concentration of SDNs
  - Consider the type of activities the grantee will engage in – some increase the likelihood of SDN interaction
- Grant language and/or certifications requiring grantees to comply with OFAC sanctions
- Third-party due diligence reviews
Costs of Non-Compliance

• Penalties *per* OFAC violation:
  
  • Criminal penalties: Up to $1 million and/or up to 20 years imprisonment
  
  • Civil fines: $295,141 or twice the value of the transaction, whichever is higher
  
  • Multiple violations often charged even for single transactions
  
  • Damage to an organization’s reputation can be significant:
    
    • Press reports
    
    • Agency releases
    
    • Even allegations of non-compliance can have reputational consequences
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The Foreign Agents Registration Act

Agents of a foreign principal engaged in covered activities must register as a foreign agent, unless covered by an exemption.
Who is a foreign principal – §611(b)

(1) “The government of a foreign country and a foreign political party”

(2) A person outside the United States (unless a domiciled U.S. citizen)

(3) A corporation, organization, association...organized under the laws of another country.
Covered Activity – §611(c)(1)(i)

• Engage in the U.S. in “political activities” for or in the interests of a foreign principal

• Within the U.S. solicits, collects, disburses, or dispenses contributions or money for or in the interests of a foreign principal
“Political Activities” §611(o)

“A]ctivity that the person engaging in believes will . . . in any way influence any . . . official of the Government of the U.S. or any section of the public within the U.S. with reference to formulating, adopting, or changing the domestic or foreign policies of the United States . . .”
Who is a “foreign agent” §611(c)(1)

“Any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal” and engages in covered activity.”
Exemptions – §613

• Bona fide trade or commerce. §613(d)
• Religious, scholastic, academic, scientific, or fine arts. §613(e)
• Humanitarian: soliciting or collecting contributions in the U.S. to be used for medical aid, food, or clothing. §613(d)
Registration, Transparency, and Sanctions

• Register with the Department of Justice as a “foreign agent” by providing inter alia:
  o Name and residential address of each director and officer of the registrant.
  o Complete list of registrant’s employees and a statement of the nature of work of each employee.
  o The registrant’s governing documents and a statement of every oral agreement relating to the registrant’s organization, powers, and purposes.
  o Each written agreement and the terms of each oral agreement that make the registrant a foreign agent, as well as information on funding or anything of value received from the foreign principal.
  o Detailed statement describing covered activities, including “political activities” and any disbursements of money. §612(a)
Registration, Transparency, and Sanctions (continued)

• Individuals engaged in covered activities for the entity must also file a short-form registration form.

• Entities and individuals must update their information, and registration forms are publicly available at www.fara.gov.

• Registrants must include a “conspicuous statement” on covered “informational materials” that the materials are distributed on behalf of the foreign principal, and these materials must be filed with the Department of Justice. §614(a)-(b).

• Violation of the Act can lead to civil penalties and/or imprisonment of up to five years. §618
Appendix

(Additional Materials re: US Sanctions)
Cuba

• General licenses in the **Cuban Assets Control Regulations** ("CACR") authorize:
  • The provision of “grants, scholarships, or awards” for:
    • Educational Activities
    • Humanitarian Projects (as set forth in a separate general license)
    • Scientific Research
    • Religious Activities
  • Activities of “private foundations or research or educational institutes with an established interest in international relations to collect information related to Cuba for noncommercial purposes”
  • Activities of “recognized human rights organizations” that are “intended to provide support for the Cuban people”
  • Certain educational activities
  • The creation and dissemination of “informational materials”
Iran

- A general license in the *Iranian Transactions and Sanctions Regulations* ("ITSR") authorizes NGOs to export services to Iran in support of certain not-for-profit activities designed to directly benefit the Iranian people:
  - Humanitarian projects to meet basic human needs in Iran
  - Non-commercial reconstruction projects in response to natural disasters in Iran
  - Environmental and wildlife conservations projects in Iran
  - Human rights and democracy building projects in Iran
- $500,000 limit on the amount that NGOs may transfer annually in support of these activities, and quarterly reporting requirements
North Korea

• A general license in the **North Korea Sanctions Regulations** ("NKSR") authorizes NGOs to export services to North Korea in support of various activities, including activities to support:
  • Humanitarian projects to meet basic human needs
  • Democracy building in North Korea
  • Non-commercial development projects directly benefiting the North Korean people
  • Activities to support environmental protection

• While certain transactions related to North Korea are authorized through this general license, what may be the only bank in North Korea – the Foreign Trade Bank of the Democratic People’s Republic of Korea – is an SDN
  • Note temporary export of tools of the trade and other items may require US government licensing
A general license in the Syrian Sanctions Regulations (‘‘SSR’’) authorizes NGOs to export services to Syria in support of not-for-profit activities to support:

- Humanitarian projects to meet basic human needs
- Democracy building in Syria
- Education in Syria
- Non-commercial development projects directly benefiting the Syrian people
- The preservation and protection of cultural heritage sites in Syria, such as museums, historic buildings, and archaeological sites

Quarterly reporting requirements for certain activities
Crimea Region of Ukraine

• In December 2014, OFAC imposed a unique “regional embargo” on the Crimea region of Ukraine

• The **Ukraine-Related Sanctions Regulations** (“URSR”) do not authorize NGOs to export to Crimea the types of humanitarian services that are the subject of general licenses in the Cuba, Iran, North Korea, and Syria programs

• A general license does authorize exports to Crimea of agricultural commodities, medicine, and medical supplies